O'Reilly Enterprises, Inc. *and* Local 917, International Brotherhood of Teamsters, AFL–CIO. Cases 29–CA–16631 and 29–CA–17169

July 14, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

On November 15, 1993, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in light of the exceptions and briefs and has decided to adopt judge's rulings, findings,[1] and conclusions as modified, and to adopt the recommended Order of the administrative law judge as modified herein.

The judge concluded that General Counsel had established that the Respondent's overall conduct indicated that it wanted to frustrate a renewal agreement with the Union and that it thereby failed to bargain in good faith. We disagree.

The judge, in reaching his conclusion, in essence found that the Respondent's bargaining table conduct was tainted by the fact that the Respondent's proposals at the bargaining table had to be cleared with Elizabeth O'Reilly, the Respondent's president who, prior to the negotiations, had engaged in coercive acts which made it clear to the unit employees that she wanted to get rid of the Union. This, coupled with the Respondent's unlawful 15-cent-per-hour wage raise given to the employees in September 1992, led the judge to his conclusion that the Respondent's overall conduct indicated a desire to frustrate a renewal agreement with the Union.

As the judge noted, in determining bad-faith bargaining, the Board examines the totality of the employer's conduct, including conduct at and away from the bargaining table. *Optica Lee Borinquen*, 307 NLRB 705, 717–721 (1992). In the instant case, the Respondent's conduct at the table seemed to indicate that the Respondent was willing to compromise with the Union in an effort to arrive at a collective-bargaining agreement. At the first negotiating session, one of the Union's main proposals was that the 50-cent-per-hour contribution, which the Respondent paid into the employees' welfare fund, be given to the employees directly in the form of a raise.[2] At the second session, the Respondent presented its proposals. No progress was made during the third session. However, at the fourth and last session, the Respondent modified its proposals and offered to give the employees the 50-cent wage raise, spreading it through a 3-year period. The Respondent also stated it would continue to negotiate with the Union.

We do not agree with the judge's conclusion that the Respondent's away from the bargaining table conduct is sufficient to warrant a conclusion that the Respondent's efforts indicated a desire to frustrate agreement. Thus, although O'Reilly's coercive conduct, together with Respondent's pre-impasse implementation of proposals are part of the totality of the Respondent's conduct, they are not sufficient, when weighed against the Respondent's willingness to compromise at the bargaining table, to warrant the conclusion that the Respondent was seeking to avoid agreement. Accordingly, we dismiss the allegation that the Respondent failed to bargain in good faith for the renewal of the contract.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, O'Reilly Enterprises Inc., Manhasset, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and renumber the following paragraphs.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We find it unnecessary to pass on the judge's finding that the statement by Elizabeth O'Reilly, the Respondent's president, to employee Annette Baibal that ''without the Union . . . it would be family again'' constituted a violation of Sec. 8(a)(1), since such a finding would be cumulative and does not affect the remedy.

[2] The Union also proposed small increases in the Respondent's contributions to existing pension and annuity funds covering the employees, an additional holiday, and minor revisions in the vacation package and in several other contract provisions.

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT grant wage increases to our employees who are represented by the Union, without having bargained in good faith thereon with the Union.

WE WILL NOT coercively interrogate any of our employees as to their support of the Union.

WE WILL NOT create the impression among any of our employees that we are keeping under surveillance their activities on behalf of the Union.

WE WILL NOT ask any of our employees to sign a petition to be used by us to avoid bargaining with the Union.

WE WILL NOT in any way promise benefits to our employees to induce them to sign such a petition.

WE WILL NOT fail to make payments to the welfare fund as required under our contract with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain in good faith with the Union as the exclusive representative of our drivers and mechanics concerning wages, hours of work, and other terms and conditions of their employment.

WE WILL make payments to the welfare fund as required and WE WILL make whole with interest any employee who suffered losses as a result of our failure to make such payments.

O'REILLY ENTERPRISES, INC.

Kevin Kitchen, Esq. and *Tracy Belifore, Esq.*, for the General Counsel.

Gary C. Cooke, Esq. (Horowitz & Pollack, P.C.), of South Orange, New Jersey, for O'Reilly Enterprises, Inc.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The consolidated complaint alleges that O'Reilly Enterprises, Inc. (the Respondent) has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent is alleged to have failed to make benefit fund payments required under its contract with Local 917, International Brotherhood of Teamsters, AFL–CIO (the Union) to have failed to bargain in good faith with the Union in renewal contract negotiations, to have given its employees a raise without bargaining thereon with the Union, and to have independently coerced its employees in the exercise of the rights guaranteed them by Section 7 of the Act. The answer filed by the Respondent puts those allegations in issue.

The hearing was held in Brooklyn, New York, on June 22 and July 20 and 21, 1993. Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent is a New York corporation engaged in providing school bus transportation services. In its operations annually, it meets the Board's standard for asserting jurisdiction.

The pleadings establish that the Union is a labor organization as defined in the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent and the Union had a collective-bargaining agreement, effective September 1, 1988, to August 31, 1992, which covered the drivers and mechanics employed by the Respondent.

B. *Alleged Coercion by the Respondent's President*

The General Counsel's witnesses testified as to the following incidents of coercive conduct by the Respondent's president, Elizabeth O'Reilly. O'Reilly did not testify.

In May 1992, she told a driver, Annette Baibal, that ''without the Union . . . it would be family again.'' In *Mid-Mountain Foods*, 291 NLRB 693, 695, 698 (1988), the Board adopted, inter alia, a finding that the employer there violated Section 8(a)(1) of the Act when its personnel director told an employee that he would be okay if he ''stayed away from the wrong crowd,'' referring to the union involved in that case. O'Reilly's remark in the instant case similarly interferes with employees' Section 7 rights as it impliedly suggests that the employees would receive more favorable treatment as family members if they abandoned the Union.

On June 5, 1992, O'Reilly asked a driver, Charles Stein, to sign a petition to enable the Respondent to sever its relations with the Union. When he hesitated, she told him that she would take good care of him if he signed it. By soliciting his signature on such a petition, the Respondent has engaged in an unfair labor practice as defined in Section 8(a)(1) of the Act. See *American Linen Supply Co.*, 297 NLRB 137 (1989). By offering Stein unspecified benefits as an inducement to him to sign the petition, the Respondent has engaged in an unfair labor practice as defined in that same section. See *Western Health Clinics*, 305 NLRB 400 (1991).

On June 11, 1992, O'Reilly told Stein that she understood that he had been talking to other drivers about the petition. He responded that he had urged them not to ''drop away from the Union.'' O'Reilly's remark to Stein created the im-

pression that the Respondent had engaged in surveillance of his activities in support of the Union. See *Kenya Knitting Mills U.S.A.*, 302 NLRB 545 (1991). In context, O'Reilly's remark also implicitly invited a response as to the extent of Stein's activities on behalf of the Union and thus constituted coercive interrogation thereof. See *Royal Midtown Chrysler Plymouth*, 296 NLRB 1039 (1989).

C. *The Renewal Contract Negotiations; the Raise on September 1 and the Discontinuance of Payments to the Welfare Fund*

In the summer of 1992, the Union met with the Respondent to negotiate a contract to replace the one scheduled to expire on August 31, 1992. There were four sessions conducted between the Union's president assisted by an employee committee and counsel for the Respondent. O'Reilly did not attend.

Each of the sessions lasted about 15 minutes. At the first session, held on June 17, 1992, the Union submitted its proposals in writing. It sought small increases in the contributions by the Respondent to a pension fund and to an annuity fund covering the unit employees. It also sought an additional holiday, minor revisions in the vacation package, and in several other contract provisions. It offered to waive the 50-cent-per-hour welfare fund payments and sought to have that money given to the employees as a raise; it stated that the 50-cent-an-hour contribution was inadequate to maintain the welfare fund. The attorneys representing the Respondent told the Union that they would review those demands with O'Reilly.

At the second session, the Respondent informed the Union that it wanted a wage freeze for 2 years with provision for wage-reopener talks in the third year. It rejected the Union's demands for increases in the amounts to be contributed to the pension and annuity funds and it advised the Union that it would keep for itself the 50-cent-an-hour contribution to the welfare fund, instead of giving it as a wage raise to the unit employees, as the Union had sought. The Respondent rejected the Union's other proposals. The Union threatened to call a strike and were informed that the Respondent does not have the money to meet the Union's demands. The Union did not ask to examine the the Respondent's books to verify that claim. The session ended after several employee grievances were discussed.

At the third session, no progress was made. Some grievances were discussed.

At the last session, held on August 27, 1992, shortly before the expiration date of the contract, the Respondent offered to spread a 50-cent-an-hour wage increase over a 3-year period, in lieu of the 50-cent-an-hour welfare fund contribution. The Union rejected the offer. The meeting ended with the Respondent advising that it remains willing to meet again for further negotiations. The Union, in a circular it distributed to unit employees that same day, stated that the Respondent's final proposal was a ''complete disgrace.'' The Union authorized a strike to begin on September 8, a week after the scheduled expiration of the contract.

On September 1, 1992, the Respondent gave each unit employee a 15-cent-an-hour raise. It also ceased contributing to the welfare fund. The contract between the Respondent required these payments.

The Respondent effected those changes without notice to the Union.

The Respondent contends that impasse was reached in negotiations on August 27 and that its grant of a 15-cent-an-hour raise on September 1 was consistent with its offer, on August 27, to spread a 50-cent-an-hour raise over 3 years in lieu of welfare fund contributions. That contention overlooks the fact that the Respondent's counsel, on August 27, stated that the Respondent was willing to meet again, thereby making clear that there was no impasse. The Union's threat to conduct a strike a week later patently was aimed at its getting a further concession. There was obviously no impasse reached. The granting of a 15-cent-an-hour raise on September 1 was aimed at forestalling a strike. It was done without prior notice to the Union. In the absence of impasse, the unilateral grant of the 15-cent-an-hour raise on September 1 and the discontinuance of welfare fund payments were in derogation of the Respondent's obligation to bargain collectively. See *Days Hotel of Southfield*, 306 NLRB 949, 956 (1992).

The complaint also alleges that the Respondent's overall conduct constituted bad-faith bargaining.

In *Bradford Coca-Cola Bottling Co.*, 307 NLRB 647 (1992), the Board stated that the essential determination to be made concerning a party's alleged failure to bargain in good faith is whether the party's overall conduct indicates that it was endeavoring to frustrate the possibility of reaching an agreement.

The record in the present case discloses that the Respondent's president had, by coercive acts, made it clear to the unit employees prior to the start of renewal contract negotiations, that she wanted to be rid of the Union.

Sandwiched between those coercive acts by O'Reilly and the unlawful unilateral grant of a 15-cent-an-hour raise on September 1 were the four negotiating sessions. These sessions were conducted, on behalf of the Respondent, by counsel who advised the Union that they would clear all proposals with O'Reilly, the very one who wanted the Union out of her way. I thus find that the Respondent's overall conduct indicated that it wanted to frustrate a renewal agreement with the Union and that it thereby failed to bargain in good faith with the Union.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices as defined in Section 8(a)(1) of the Act by having:

(a) Coercively interrogated employees as to their support for the Union.

(b) Impliedly provided employees benefits to induce them to withdraw their support of the Union.

(c) Solicited its employees to sign a petition to remove the Union as their collective-bargaining representative.

(d) Created the impression among its employees that it has kept their union activities under surveillance.

(e) Engaged in the conduct described in paragraph 4 below.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act by having:

(a) Granted its employees a wage raise without having bargained collectively thereon with the Union, their exclusive collective-bargaining representative.

(b) Failed to bargain in good faith with the Union for a renewal contract.

On the above findings of fact and conclusions of law and the entire record, I issue the following recommended[1]

ORDER

The Respondent, O'Reilly Enterprises, Inc., Manhasset, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with Local 917, International Brotherhood of Teamsters, AFL–CIO (the Union).

(b) Granting a wage increase to its employees who are represented by the Union, without having bargained in good faith thereon with the Union.

(c) Coercively interrogating any of its employees as to their support of the Union.

(d) Creating the impression among any of its employees that it is keeping under surveillance their activities on behalf of the Union.

(e) Asking any of its employees to sign a petition to be used to avoid bargaining with the Union.

(f) Impliedly promising benefits to its employees to induce them to sign such a petition.

(g) Failing to remit to the welfare fund payments as required under its contract with the Union.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union as the exclusive representative of its drivers and mechanics concerning wages, hours of work, and other terms and conditions of their employment.

(b) Remit payments to the welfare fund as required under its contract with the Union[2] in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and make whole its employees for any losses they suffered as a result of its failure to make contractually required fund payments with interest thereon as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Manhasset, New York, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days of the date of this Order, what steps the Respondent has taken to comply.

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] The contract requires the Respondent to pay 50 cents an hour for each hour worked by the unit employees. The welfare fund had assumed that all these employees work a 40-hour week. The record indicates that they may not work a full week.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''